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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 1024

HARRY BECKER,

Petitioner,

vs.

LOEW'S INCORPORATED, A DELAWARE CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Counsel for Respondent.

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Summary of Argument.

I.

Unless there is copying of a substantial part or portion of a copyrighted work, there is no infringement. In the case at bar there was no copying and there are no similarities whatever between petitioner's book and respondent's motion picture..... 5

II.

Unless access is shown there is no infringement. Neither the author of the film script, nor any of the employees of respondent who produced the picture, knew of petitioner's book prior to the production of the picture 6

III.

Copyright does not protect title. In addition, in the case at bar the title was the independent creation of respondent 8

IV.

Petitioner's book is an expression in essay form of generalized abstract ideas and thoughts. Petitioner's book could not be dramatized without being entirely rewritten. Protection under the provisions of the copyright act (including the so-called "exclusive right to dramatize") does not extend to abstract thoughts or ideas. It is not the subject but the "treatment" of the subject which is protected by copyright..... 10

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VI.

Petitioner's title never attained secondary meaning. Respondent's picture was not in unfair competition with petitioner's book 11

VII.

Prior to the production of respondent's motion picture there was an affirmative failure of petitioner's book to attain secondary meaning; sales of petitioner's book having ceased. Thus, even if the title had not been independently conceived by respondent, respondent's use of the title did not deprive petitioner of an opportunity for his work to acquire secondary meaning. In this case, therefore, there is no occasion to determine whether under the copyright act an author has the right to be given sufficient time for his work to acquire secondary meaning 12

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LOEW'S INCORPORATED, A DELAWARE CORPORATION,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Nature of the Case.

This action was brought for an accounting of profits, an injunction and damages, because of (a) the alleged infringement of copyright of petitioner's book by respondent's motion picture, and (b) the alleged unfair competition of the motion picture with the book.

The District Court entered judgment for petitioner. (R. 289.) Upon appeal to the United States Circuit Court of Appeals for the Seventh Circuit, the judgment of the District Court was reversed and remanded to the District

Court with directions to dismiss the Complaint. (R. 322.) The opinion of the court is set forth at pages 314-321 of the record.

The Book and the Picture.

The motion picture was viewed by the Court below upon the argument of the appeal. In its opinion the Circuit Court of Appeals concisely and correctly summarizes the book and picture as follows:

(a) The book:

"In August, 1936, the plaintiff, Harry Becker, wrote and copyrighted a book entitled 'We Who Are Young,' discussing economic and political problems with particular reference to the Roosevelt-Landon Presidential campaign. It did not have a large sale. Possibly 700 copies of the book were distributed by gift or sale, nearly all of them during 1936, and it was reviewed in some newspapers shortly after its publication. The book compares the doctrines of President Roosevelt as opposed to those of reactionaries and Karl Marx, and shows that the source material was 'Das Kapital' by Marx, 'Looking Forward' and 'On Our Way' by President Roosevelt, Taussig's 'Principles of Economics' and Walter Lippman's 'The New Method of Freedom.' The book has no plot, no story, no character developments, no sequence of incidents, only an abstract, general discussion in essay form. And plaintiff's claim for infringement rests on such general passages as: 'We who are young, have seen this strife for property and find it not to our liking. We do not want to struggle ceaselessly to accumulate property to gain an illusory security. We would rather have security without great wealth.' " (R. 314-315.)

(b) The picture:

"Bill, the husband, and Margy, his young wife, worked for the same business firm which had a rule that no married woman might work there. When their marriage was discovered, Margy was dismissed. The furniture company repossessed their household goods

after Margy discovered she was going to become a mother. Bill lost his job and could not find another. Finally, however, an acquaintance got a job for him and Bill hurried back to his prior employer's office to get an office survey system which he had developed; on meeting Beamis, his former employer, he angrily told him what he thought of the firm's management. When he returned home, Bill found Margy in agony. After unsuccessfully trying to get an ambulance, Bill stole a car, bundled Margy into it, and started for the hospital. Policemen stopped him, but on taking in the situation, cleared traffic with their sirens while Bill drove at breakneck speed to the hospital where Mary gave birth to twins. When the car owner withdrew his complaint and Beamis sent Bill a letter asking him to come back to the firm under new conditions, Bill faced a new and brighter future. Plot, story, incident, and character development were used to bring out the romantic theme." (R. 315-316.)

Jurisdiction.

There is no question involved in this case which warrants review by this Court.

The case presents no question suggested by General Rule 38, Subdivision 5 (b) of this Court. Accordingly, the petition should be denied (*Keller* v. *Adams Campbell Co.*, 264 U. S. 314, 319; *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 393; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178-179).

Questions Set Forth in the Petition.

Petitioner has enumerated seven questions said to be presented. In the main, these questions are hypothetical and are not present in this case.

The Questions in This Case.

The sole questions in this case are:

(a) Whether a motion picture independently conceived and produced and exhibited for entertainment, which depicts a romance between a newly married couple, infringes the copyright on a book published for use during the Roosevelt-Landon Presidential campaign in the year 1936, and which discusses in the most abstract terms and in a serious vein economic and social problems of that day.

(b) Whether the said motion picture, entitled "We Who Are Young," released in 1940, unfairly competes with the said book, likewise entitled "We Who Are Young," where but 700 copies of the said book were distributed by gift or sale, nearly all of them during the year 1936.

By its decision, both of these questions were answered in the negative by the Court below.

ARGUMENT.

I.

The Motion Picture Bears No Resemblance to the Copyrighted Work and There Are No Similarities Between Them.

In petitioner's book there is no story, plot or characters. It is devoid of any incidents, dramatic or otherwise. The book merely discusses political and economic theories—long in the public demesne—in the most general terms, and petitioner's ideas relative thereto.

In *Shipman* v. *R. K. O. Radio Pictures*, 100 F. (2) 533 (C. C. A. 2), Judge Learned Hand, writing for the Court, said:

> "*Nichols* v. *Universal Pictures Corp.*, followed exactly the same doctrine that we are using now; it held that there is a point where the similarities are so little concrete (are therefore so abstract) that they become only 'theme,' 'idea,' or skeleton of the plot, and *that these are always in the public domain; no copyright can protect them.*" (Italics ours.)

The motion picture is a love story concerning a young married couple and tells of their experiences in establishing themselves. The motion picture expresses no political or economic theories, nor are these theories discussed. The photoplay is predicated upon various instances and experiences, either personal to the author (Dalton Trumbo) or to his friends and acquaintances. (R. 315.)

Unless there has been a copying of a substantial part or portion of the copyrighted work there is no infringement (*Nichols* v. *Universal Pictures Corp.*, 34 F. (2) 145; affirmed 45 F. (2) 119; certiorari denied 282 U. S. 902; *Holmes* v. *Hurst*, 174 U. S. 82; *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 81 F. (2) 49; *Shipman* v. *R. K. O. Radio*

Pictures, 100 F. (2) 533; *Harold Lloyd Corporation* v. *Witwer,* 65 F. (2) 1.

Mere similarities do not constitute infringement (*Roe-Lawton* v. *Hal E. Roach Studios,* 18 F. (2) 126; *Kustoff* v. *Chaplin,* 120 F. (2) 551; *Fendler* v. *Morosco,* 253 N. Y. 281; *Bein* v. *Warner Bros. Pictures, Inc.,* 105 F. (2) 969).

By copyrighting his book petitioner merely obtained protection of the manner in which he expressed his ideas,—not of the ideas themselves. (*Dorsey* v. *Old Surety Life Ins. Co.,* (C. C. A. 10) 98 F. (2) 872, 873; *Ansehl* v. *Puritan Pharmaceutical Co.,* (C. C. A. 8) 61 F. (2) 131, 132; certiorari denied 287 U. S. 666; *Kaeser & Blair, Inc.* v. *Merchants' Ass'n, Inc.,* (C. C. A. 6) 64 F. (2) 575, 577; *Eichel* v. *Marcin,* 241 F. 404; Amdur on Copyrights, 1936 Ed., p. 5; Drone on Copyright, pp. 98, 385.

In the case at bar, there is no similarity in phrase, style or mode of expression between the two works involved. The fact is there is no similarity whatever, substantial or otherwise.

II.

Respondent Did Not Have Access to Petitioner's Book.

The picture was based upon a work written by Dalton Trumbo, an experienced novelist and writer, who gave his play the title, "To Own The World." After the picture was produced, but before it was released, several changes were made in the title, and finally at the suggestion of Frank Whitbeck, an employee of defendant, the title, "We Who Are Young," was chosen. Whitbeck had never heard of plaintiff's book until after he suggested the title. (R. 315.) Trumbo "had no knowledge of plaintiff's book or its contents and he wrote the story in 1939, basing it on his own experience and those of his friends, who were

attempting to solve the problem of getting married on a small salary". (R. 315.)

Unless defendant had access to the copyrighted work and unless there was copying there could be no infringement. (*Shipman* v. *R. K. O.*, 20 F. S. 249, affirmed 100 F. (2) 533.) The evidence showed that neither Trumbo, the author, nor the producer, the director, nor anyone who had any connection with the picture ever heard of petitioner or of his book prior to the production of the picture. As was stated in *Harold Lloyd Corporation* v. *Witwer*, 65 F. (2) 1 (C. C. A. 9), at p. 16:

> "Without such knowledge there could be no copying and their production would have been original no matter how closely it resembled (plaintiff's) story."

"In order to copy, one must have something to copy from" (*Frankel* v. *Irwin*, 34 F. (2) 142, 143).

Even if there were similarities between the two works, unless those similarities were the result of access and copying there would be no infringement.

> "* * * but if by some magic a man who had never known it were to compose anew Keats' Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats'." (*Sheldon* v. *Metro-Goldwyn Pictures Corporation*, 81 F. (2) 49, 54; certiorari denied 298 U. S. 669.)
>
> "* * * the law imposes no prohibition upon those who, without copying, independently arrive at the precise combination of words or notes which have been copyrighted." (*Fisher, Inc.* v. *Dillingham, et al.*, 295 F. 145, 147.)

III.

The Copyright Did Not Protect the Title of Petitioner's Book.

Without exception, the cases hold that a title is not protected by copyright. (*Warner Bros. Pictures, Inc.* v. *Majestic Pictures Corporation, et al.*, 70 F. (2) 310; *International F. Service Co.* v. *Associated Producers*, 273 F. 585; *Atlas Mfg. Co.* v. *Street & Smith*, 204 F. 398; *Glaser* v. *St. Elmo Co.*, 175 F. 276; *Corbett* v. *Purdy*, 80 F. 901; *Harper* v. *Ranous*, 67 F. 904; *Osgood* v. *Allen*, Fed. Cas. No. 10,603; *Collins* v. *Metro-Goldwyn Pictures Corporation et al.*, 25 F. Supp. 781; *Affiliated Enterprises, Inc.* v. *Rock-Ola Mfg. Corp.*, 23 F. Supp. 3; *Patten* v. *Superior Talking Pictures, Inc.*, 8 F. Supp. 196; *Oxford Book Co., Inc.* v. *College Entrance Book Co., Inc.*, 98 F. (2) 688; *Francis Day & Hunter Limited* v. *Twentieth Century Fox Corporation Limited et al.*, 56 Times Law Reports 9.)

Even if petitioner's title were protected by copyright there would be no infringement in the instant case, because the title was independently conceived by defendant. As the Circuit Court of Appeals stated in its opinion (R. 315), "the story by Trumbo was originally entitled 'To Own the World,' the title of the photoplay was changed to 'I Do' and finally, on the suggestion of one Whitbeck, defendant's employee, to 'We Who Are Young.' Whitbeck testified that he had never heard of plaintiff's book until after he had suggested the title to defendant."

Sheldon v. *Metro-Goldwyn Pictures Corporation, supra.*

Fisher, Inc. v. *Dillingham, et al., supra.*

But petitioner contends that because his title is taken from the context of his book, he is entitled to protection under the copyright law (petitioner's brief, p. 19). Upon

examination, it will be found that in a great many instances titles stem directly from the context. Since there was no access to petitioner's book, this theory, even if correct, would not be applicable in the instant case. However, even if there has been access, petitioner's theory finds no support in the statute or in the adjudicated cases. The fact is that the particular phrase constituting petitioner's title is not entitled to protection even within the context of the book. As is stated by the Circuit Court of Appeals in its opinion (R. 317):

> "Neither the words nor the particular combination of words 'We Who Are Young' are unique. They are not the type of words to be found only in the vocabulary of a Bentham or a Veblen, but are, with minor variations, extremely common and generally used by everyone. They are merely a descriptive phrase in the English language, *Oxford Book Co.* v. *College Entrance Book Co.*, 98 F. (2) 688. These identical words were used in a report of William W. Hinckley to the Third American Youth Congress entitled 'Young Seeks Peace—Freedom and Progress,' published shortly before plaintiff's book. Shakespeare used substantially similar words, 'we that are young,' in the closing lines of 'King Lear.' Similar words taken from the context of a copyrighted book for its title have not been protected by the copyright when used as a title for a motion picture. *Collins* v. *Metro-Goldwyn Pictures Corp.*, 25 F. S. 781."

The author of a title expressing an idea or thought is not given a monopoly thereof by the statute, because that would result in a monopoly of the thought, idea or subject expressed. If words or phrases constituting a title were protected by copyright a substantial part of the field of expression and thought would soon be monopolized by a few authors. This would clearly be contrary to all substantive law in the matter of copyright.

IV.

The Exclusive Right to Dramatize Does Not Give to an Author a Monopoly of His Ideas or Thoughts, or of the Subject Matter of His Writing, But Merely Protects the Author's Mode of Expression.

Petitioner's book could not be dramatized without being entirely rewritten. (R. 319.) But petitioner argues that the exclusive right to dramatize under Section 1b lodges in him the sole right to dramatize the subject matter and title of his book.

It is axiomatic that Copyright Statute does not extend to abstract thoughts or ideas. It is not the subject that is protected but rather the treatment of the subject (*Nichols* v. *Universal Pictures Corp.*, 45 F. (2) 119; *Echevarria* v. *Warner Bros. Pictures,* 12 F. Supp. 632; *Eichel* v. *Marcin,* 241 F. 404; *Roe-Lawton* v. *Hal E. Roach Studios,* 18 F. (2) 126; *Shipman* v. *R.K.O. Radio Pictures,* 100 F. (2) 533).

In effect, therefore, petitioner contends that the right to dramatize is broader than any other right under the Copyright Statute and gives him a monopoly of general thoughts, ideas and theories contained in his book, which, except for his claim under the right to dramatize, would not otherwise be protected by the statute. Such a contention is contrary to the spirit and purpose of the Copyright Law and has always been rejected (*American Tobacco Co.* v. *Werckmeister,* 207 U. S. 284, 52 L. Ed. 208; *Baker* v. *Selden,* 101 U. S. 99, 25 L. Ed. 841; *Arnstein* v. *Edward B. Marks Music Corporation,* 82 F. (2) 275; *Eichel* v. *Marcin,* 241 F. 404; *Griggs* v. *Perrin,* 49 F. 15).

(See also cases cited under Point I hereof, pp. 5-6 hereof.)

V.

The Decision of the Court Below Is in Harmony With Dam v. Kirk La Shelle Co., 175 F. 902.

Petitioner, at page 17 of his brief, argues that the decision of the Court below is in conflict with *Dam* v. *Kirk La Shelle Co.*, and that it rejected the authority of that case.

Upon an examination of the *Dam* case, it will be found that the decision of the Circuit Court of Appeals is not at war with that case, but, on the contrary, is in complete agreement with it. There it was said by the Court, at page 907:

> "It is undoubtedly true, as claimed by the defendant, that an author cannot by a suggestion obtain exclusive control of a field of thought upon a particular subject. If the playwright in this case without the use of the story, and working independently, had constructed a play embracing its central idea, it may well be that he would not have infringed the copyright of the story."

VI.

Unfair Competition Results Only After the Attainment of Secondary Meaning.

Petitioner's title had not attained secondary meaning. Petitioner's book was published in 1936. Only 700 copies were distributed by gift or sale, nearly all during 1936. Respondent's picture was released in 1940, four years after the publication and distribution of petitioner's book. (R. 314-315, 320.) Before an author is entitled to protection under the doctrine of unfair competition he must show that his title had attained a secondary significance. This petitioner failed to do. (*Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111, 118; *Manners* v. *Triangle Film Corp.*, 247 F. 301; *American Fork & Hoe Co.* v. *Stampit Corp.*, 125 F. (2) 472, 475.)

VII.

The Construction of the Copyright Act Relative to Right to Dramatize Is Not Involved; the Book Having Affirmatively Failed to Acquire a Secondary Meaning Before Respondent Conceived and Used the Title.

Petitioner has attempted to inject into this case the issue as to whether an author of a work capable of dramatization is deprived of the right to dramatize if other persons use his title before it has acquired a secondary meaning. That issue is not involved here because: (a) petitioner's copyrighted work could not be dramatized without so much creative work that the dramatic composition would not constitute a plagiarism of the copyrighted work (R. 319) and (b) since there had been but 700 copies of petitioner's work distributed (mostly by gift) and sales had ceased several years before the production of respondent's picture there was no possibility that secondary meaning of petitioner's title still could be acquired. (R. 314, 320.)

Conclusion.

It is respectfully submitted that the petition does not present adequate reasons for the allowance of the writ of certiorari applied for.

Respectfully submitted,

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